

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FILED
03 OCT 27 PM 4:23
CLERK OF COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES OF AMERICA

v.

CASE NO.: 8:03-CR-77-T-30-TBM

SAMI AMIN AL-ARIAN,
SAMEEH HAMMOUDEH,
GHASSAN ZAYED BALLUT,
HATIM NAJI FARIZ

**RESPONSE BY THE UNITED STATES TO MOTION TO STRIKE AS SURPLUSAGE
PARAGRAPHS FORTY-THREE (236), (240), (247), AND (253) OF THE INDICTMENT,
AND TO DISMISS COUNTS THIRTY-FIVE, THIRTY-SEVEN, FORTY-ONE, AND
FORTY-THREE OF THE INDICTMENT BY DEFENDANT HATIM NAJI FARIZ**

The United States of America by Paul I. Perez, United States Attorney, Middle District of Florida, hereby opposes Defendant HATIM NAJI FARIZ'S ("FARIZ") Motion to Strike as Surplusage Paragraphs Forty-three (236), (240), (247), and (253) of the Indictment, and to Dismiss Counts Thirty-Five, Thirty-Seven, Forty-One, and Forty-Three of the Indictment, (Doc. 256) and in support thereof states the following:

I. BACKGROUND

In February 2003, a grand jury charged FARIZ and seven co-defendants with numerous crimes related to their alleged involvement with the Palestinian Islamic Jihad ("PIJ"). (See Doc. 1, Indictment.) PIJ is an international terrorist organization that uses violence in an attempt to pressure Israel into ceding sovereign land to create an Islamic state and eradicating the United States' influence within the Middle East. (See id. ¶¶ 2-3.) Specifically, the grand jury charged FARIZ with conspiracy to commit racketeering in violation of 18 U.S.C. § 1962(d); conspiracy to murder, maim, or injure persons outside the United States in violation of 18 U.S.C. § 956(a)(1); conspiracy to provide

340

material support to a Foreign Terrorist Organization ("FTO") in violation of 18 U.S.C. § 2339B; conspiracy to make and receive contributions of funds, goods, or services to a Specially Designated Terrorist ("SDT") or Specially Designated Terrorist Group ("SDTG") in violation of 18 U.S.C. § 371; as well as nine counts of violations of the "Travel Act" (18 U.S.C. § 1952(a)), for his participation in interstate or international telephone conversations intended to promote PIJ's extortion and money laundering. (Id.)

In Overt Acts 236 and 253 of Count One, the grand jury found that FARIZ had engaged in telephone conversations with codefendant ABD AL AZIZ AWDA ("AWDA"), whom had been identified as a "founder and spiritual leader of the PIJ and a member of the governing Shura Council of the PIJ" and as a SDT pursuant to Executive Order 12947. (Id. Ct. 1 ¶¶ 12, 43(236), 43(253).) In a telephone call on May 26, 2003, which is Overt Act 236, FARIZ had a telephone conversation about money in which, among other things, it was discussed that the terrorist organization HAMAS was receiving most of the donations and FARIZ criticized Floridians for being suspicious about who received their donations. In a telephone call on November 10, 2002, which is Overt Act 253, FARIZ again discussed fund raising and his concern that the name of the organization receiving the money was a security concern in the United States. FARIZ instructed the other speaker to change the organization's name, to be wary of informants, and compartmentalize information. FARIZ further mentioned that he had begun to use a shell corporation he had created several years before and refused to transfer funds directly to the organization's bank account. (Id. ¶¶ 43(240),

43(247).) The grand jury also charged in Overt Acts 240 and 247 that FARIZ had engaged in telephone conversations with codefendant GHASSAN ZAYED BALLUT ("BALLUT") during which AWDA and his activities were discussed.

At the detention hearing, the government proffered that defendant FARIZ had been in recent and direct contact with co-defendant AWDA, and argued that such evidence showed FARIZ was a danger to the community. D-63 at 6-7 and 53-55. On April 7, 2003, shortly after the detention hearing, the United States received information suggesting that the speaker in the conversation described in Overt Act 253 was not AWDA but was instead another PIJ member. (See Doc. 71 ¶ 1.) Because of the information's potential impact on FARIZ's detention status, the United States filed a Supplement to the Record the same day to bring this information to the attention of both the Court and defense counsel.¹ (Id.) The Supplement stated that in light of the exculpatory information concerning the identity of the speaker in Overt Act 253, the United States believed that "references to ABD AL AZIZ AWDA in Overt Acts 236, 240 and 247 in Count I are suspect." (Id. ¶ 1.) The United States also withdrew its previous proffer, given for the purposes of FARIZ's detention hearing, that FARIZ had been in recent and direct contact with AWDA. (Id. ¶ 2.)

On April 8, 2003, the Magistrate Judge held a status hearing to obtain further explanation of the Supplement and to determine the impact, if any, of the potential misidentification on FARIZ's detention status. (Tr. of April 8, 2003 Status Hearing (attached hereto as Attachment A) at 2-3.) The United States reiterated that it now

¹Since that time, FARIZ has received copies of taped conversations supporting Overt Acts 236, 240, 247, and 253 in discovery.

believed that the speaker in Overt Act 253 was not AWDA but another PIJ member, and that the mistake that had resulted in the misidentification could possibly affect Overt Acts 236, 240, and 247. (Id. at 2, 4, 24.) The United States has no information to support the belief that any other reference to AWDA in the Indictment other than in Overt Acts 236, 240, 247, and 253 is inaccurate or suspect. (See id. at 12-15.)

Based on the government's Supplement to the Record and discussions with the Magistrate Judge on April 8, 2003, FARIZ has filed the instant motion to strike. FARIZ primarily argues that the misidentification of AWDA makes the allegations "immaterial and irrelevant," simply because they no longer involve or relate to "a top-ranking member of the PIJ." (Doc. 256 ¶¶ 5, 7, 9, 13, 16.) He also complains that the inclusion of the allegations "greatly prejudices" him because the jury will be left with "the incorrect perception that the government correctly alleged, and the grand jury believed, that Mr. FARIZ had these conversations with Mr. AWDA." (Id. at 7.) Based on his motion to strike, FARIZ requests dismissal under Federal Rule of Criminal Procedure 7(c)(1) of Counts 35, 37, 41, and 43 which allege violations of the Travel Act because they "solely rely upon the allegations of Paragraphs 43(236), (240), (247), and (253), respectively." (Id. at 7-8.)

II. SUMMARY OF THE ARGUMENT

The Court should deny the motion to strike Overt Acts 236, 240, 247, and 253 of the Indictment because FARIZ has not shown and cannot show that the allegations are irrelevant and prejudicial as Federal Rule of Criminal Procedure 7(d) requires.

Contrary to his contentions, FARIZ cannot satisfy Rule 7(d)'s standard simply by asserting that the allegations in the challenged overt acts are false or based on false evidence because it is well established that grand jury findings cannot be challenged before trial on such a ground. Nor may he ask the Court to assess the United States' ability to prove the allegations or evaluate the weight of the United States' evidence against him. Accordingly, the Court should determine the relevance of the challenged overt acts as they are stated in the current Indictment. Because FARIZ makes no showing that the overt acts as alleged are irrelevant and prejudicial, the Court should deny his motion.

Even if, however, the Court considers the overt acts in light of the government's Supplement to the Record and subsequent discussion with the Magistrate Judge, FARIZ's motion still fails. The reference to co-defendant AWDA was important to the issue of detention because it showed that defendant FARIZ was in recent and direct contact with an alleged high-ranking member of the PIJ. (As opposed to merely attempting to speak with the Secretary General of the PIJ, Ramadan Abdullah Shallah (See Doc. 1 at P. 43 (250))). Hence, the misidentification was exculpatory as to FARIZ in the detention issue. The new information, however, does not eliminate or reduce the relevancy of those overt acts to the charges against FARIZ in the upcoming trial because the information nonetheless supports the inference that the person with whom or about whom FARIZ spoke in the overt acts is a member of PIJ and they are discussing financial matters of the PIJ. Thus, the only difference between the overt acts as they were originally found by the grand jury and as the United States intends to prove at trial is the name and position of the PIJ member who is involved. Given the

substance of the conversations, neither FARIZ's criminal liability under each charged offense nor the relevance of the overt acts to the charges is altered just because the PIJ member with whom FARIZ interacted was someone other than AWDA.

Because the allegations in overt acts 236, 240, 247, and 253 – even when considered in light of the government's Supplement to the Record and subsequent discussion with the Magistrate Judge – indicate that FARIZ was speaking with PIJ members on international or interstate telephone calls about PIJ affairs and engaging in or facilitating illicit money transfers between PIJ members, they still establish that FARIZ violated the "Travel Act" by using facilities of interstate or international commerce to promote extortion and money laundering. Likewise, the Overt Acts are relevant to charges that FARIZ engaged in a conspiracy to conduct the activities of the PIJ enterprise through a pattern of racketeering activity and provided material support to a designated FTO and SDTG. Thus, they cannot be considered surplusage.

Even if FARIZ could establish irrelevance, his motion fails because his claims of prejudice are premature. The case against him is still in the pre-trial discovery and motion stage. Most importantly, when the time arrives for the indictment to be discussed in a jury's presence, the court will instruct the jury that the indictment is merely a guide to the charges and the United States' version of the facts, and not evidence in itself. The jury will also be instructed that its role is to independently weigh the evidence presented at trial and determine the facts. These instructions prevent any potential prejudice based on the difference between the indictment's allegations and the proof presented at trial. Indeed, given these standard instructions it is likely that any variance between the Indictment's allegations and the evidence presented at trial would

be detrimental to the United States, and not to FARIZ.

Since he cannot show the irrelevance to the charges against him (including the “Travel Act” charges) and prejudicial effect of Overt Acts 236, 240, 247, and 253, FARIZ’s motion to strike must fail. It follows then that FARIZ’s motion to dismiss Counts 35, 37, 41, or 43 likewise fails because it relies solely on the striking of the overt acts.

III. ARGUMENT AND AUTHORITIES

A. The challenged Overt Acts are relevant to the charged offenses and are not prejudicial. Therefore, FARIZ cannot satisfy the standard articulated in Fed. R. Crim. P. 7(d) for striking allegations in an indictment.

A motion to strike language from the indictment as surplusage under Federal Rule of Criminal Procedure 7(d) may not be granted unless it is clear that the language is ***both*** “not relevant to the charge” ***and*** “inflammatory and prejudicial.”² United States v. Awan, 966 F.2d 1415, 1426 (11th Cir. 1992). ‘Relevant evidence’ is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401. Allegations or evidence are not prejudicial simply because they are adverse to the defendant, but rather must tend to suggest a decision on an improper basis. See United States v. Ballou, 656 f.2d 1147, 1155 (5th Cir. 1981);

²Generally when adjudicating challenges to the validity and sufficiency of the indictment, courts construe the indictment as a whole. See United States v. Strauss, 285 F.2d 953, 955 (5th Cir. 1960). Thus, the suspect allegations must be considered in light of the rest of the indictment.

Dollar v. Long Mfg., 561 F.2d 613, 618 (5th Cir. 1977).³

Under this standard, courts may not strike an allegation from the indictment if the allegation is admissible and relevant to the charges, regardless of how prejudicial the language is to the defendant. United States v. Scarpa, 913 F.2d 993, 1013 (2d Cir. 1990); United States v. Edwards, 72 F. Supp. 2d 664, 667 (M.D. La. 1999). Similarly, if the language is information that the United States hopes to properly prove at trial and is relevant, it cannot be considered surplusage no matter how prejudicial it may be. United States v. Climatemp, Inc., 482 F. Supp. 376, 391 (N.D. Ill. 1979), aff'd sub nom., United States v. Reliable Sheet Metal Works, Inc., 705 F.2d 461 (7th Cir. 1983); United States v. Hill, 799 F. Supp. 86, 88-89 (D. Kan. 1992); United States v. Wecker, 620 F. Supp. 1002, 1007 (D. Del. 1985).

The standard for striking surplusage is "most exacting," Awan, 966 F.2d at 1426, and has been "strictly construed against striking surplusage," United States v. Rezaq, 134 F.3d 1121, 1134 (D.C. Cir. 1998). See also 1 Charles A. Wright, Federal Practice and Procedure § 127 (3d ed. 2003) ("only rarely has surplusage been ordered stricken"). Because Rule 7(d) is written in permissive and not mandatory language, district courts retain the discretion to deny such motions. See Rezaq, 134 F.3d at 1134; Fed. R. Crim. P. 7(d).

³ In Bonner v. City of Prichard, Ala., 661 F.2d 1206 (11th Cir. 1981), the Eleventh Circuit Court of Appeals held that decisions of the United States Court of Appeals for the Fifth Circuit handed down on or before September 30, 1981 would be binding precedent in the Eleventh Circuit appellate, district and bankruptcy court. Id. at 1207.

1. FARIZ cannot ground his motion in attacks on the credibility or truth of the alleged overt acts.

At the outset, it is of no moment that the United States has admitted the inadvertent misidentification to the grand jury of AWDA in Overt Acts 236, 240, 247, and 253. Courts have long refused to permit challenges to an indictment based on the grand jury's consideration of false evidence, absent a showing of prosecutorial misconduct – which FARIZ does not and cannot allege occurred in this case. See United States v. DiBernardo, 775 F.2d 1470, 1475 (11th Cir. 1985) (reversing dismissal of indictment for inadvertent provision of false testimony to grand jury because there was no evidence of government misconduct); see also United States v. Cruz, 478 F.2d 408, 412 (5th Cir. 1973) (refusing to review a grand jury indictment although the defendant claimed it was not based on *any* probative evidence). “That an allegation of the indictment may be false does not render it surplusage so as to permit it to be stricken pretrial.” United States v. Johnson, 585 F. Supp. 80, 81 (M.D. Tenn. 1984). Thus, FARIZ cannot challenge the relevancy or validity of all the allegations stated in Overt Acts 236, 240, 247, and 253 merely by asserting that they are false or may contain a falsity.

FARIZ's request that the Court adopt statements made by the Magistrate Judge when he evaluated the United States' evidence against him for purposes of detention, (see Doc. 256 ¶¶ 6, 10), is a thinly-veiled attempt to improperly challenge the weight and credibility of the evidence before trial. The Magistrate Judge's statements regarding the detention evidence were relevant only to that inquiry. The Court is not faced with a detention decision regarding FARIZ at this time. The scope of a court's

authority upon a pretrial motion to strike or dismiss an indictment differs markedly from that at a detention hearing held pursuant to 18 U.S.C. § 3142. In the latter situation, the court may independently evaluate the weight of the evidence against the defendant to determine whether the defendant has rebutted any presumption of detention created by 18 U.S.C. § 3142(e). See United States v. Hurtado, 779 F.2d 1467, 1479-80 (11th Cir. 1985); 18 U.S.C. § 3142(g). Outside of a bail hearing, however, credibility of evidence is not to be considered until trial. Johnson, 585 F. Supp. at 81 (“The truth of the allegations in an indictment is tested at trial and not by pretrial motion.”). This is true whether the pretrial motion is one to dismiss the indictment under Rule 12, see Fed. R. Crim. P. 12(b)(2), or one to strike surplusage under Rule 7, Johnson, 585 F. Supp. at 81. See also United States v. Garey, 813 F. Supp. 1069, 1074 (D. Vt. 1993). A motion to strike under Rule 7(d) is simply not the appropriate venue for determining “what evidence the government can admit or what facts the government can prove.” United States v. Jackson, 850 F. Supp. 1481, 1507 (D. Kan. 1994). Thus, FARIZ’s insinuation that the Court may determine the weight of the challenged overt acts or the credibility of the evidence supporting them must be rejected.

Because the grand jury findings are not subject to challenge based on their truth or falsity, the Court should apply the Rule 7(d) standard to Overt Acts 236, 240, 247, and 253 as they are currently stated in the Indictment. Since FARIZ does not even attempt to demonstrate or argue that they are irrelevant to the charged offenses, including Counts 35, 37, 41, and 43, his motion to strike fails.

2. The challenged Overt Acts should not be stricken under Rule 7(d) because each is relevant to Counts One through Four and establishes the essential elements of a Travel Act violation.

Even if the Court considers the government's Supplement to the Record and subsequent discussion with the Magistrate Judge when construing the challenged paragraphs, FARIZ fails to satisfy the first prong of the Rule 7(d) standard because he cannot show that Overt Acts 236, 240, 247, and 253, as so construed, are irrelevant to the charges against him. Even in light of the misidentification, these Overt Acts and the evidence that the United States intends to present supporting them establish the fact and nature of FARIZ's contacts and unlawful dealings with a PIJ member. For purposes of the charged offenses, it makes no difference whether the person identified in the Overt Act is the head of the PIJ or a PIJ underling. FARIZ's ultimate criminal liability remains the same.

Specifically, the Overt Acts allege that FARIZ had conversations with PIJ members about PIJ affairs including fund-raising activities and specific instances of intra-member transfers and distribution of PIJ money. As discussed below, the allegations of the content of each of these conversations are probative of facts of consequence to Counts One through Four against FARIZ and state the elements for individual violations of the Travel Act. Because they are relevant to the charges against FARIZ, the Overt Acts are not surplusage under Rule 7(d).

- a. Overt Act 253 (Count 43)

Correcting for the misidentification, Overt Act 253 alleges that during a conversation with a PIJ member located outside Florida, FARIZ, while located in Florida, (a) discussed sending money to that PIJ member; (b) instructed the PIJ

member to change the name of the PIJ member's organization based on fear that the name of the organization was a security concern in the United States; (c) warned the PIJ member to compartmentalize information; (d) stated that he had begun to use a shell organization that he had previously established but had not used for several years; and (e) stated his intention to send money via the normal transfer in response to the PIJ member's offer to give him the PIJ member society's bank account number. (See Doc. 1 Ct. 1 ¶ 43(253); Doc. 71 ¶ 1.) These facts are probative of FARIZ's contacts with other PIJ members; the methods by which PIJ's fund-raising and distribution activities were carried out and his knowledge thereof; his intent, preparation and plan to conceal PIJ's activities; and his knowledge of the illegality of such activities.

Thus, they are relevant to required elements of the offense stated in Count One (RICO conspiracy) because they indicate the nature of and means by which the RICO enterprise operated, the existence of the conspiratorial agreement, and FARIZ's role and activities in furtherance of the conspiracy. See United States v. Bin Laden, 91 F. Supp. 2d 600, 622 (S.D.N.Y. 2000) (stating that allegations of the commission of certain acts may support an inference of the existence of and the defendant's participation in alleged conspiracies); Edwards, 72 F. Supp. 2d at 667-68 (refusing to strike overt acts describing contacts that offered proof of the structure and means by which the RICO enterprise operated). The allegation regarding money transfers among PIJ members is relevant to Count Two (conspiracy to murder or maim abroad) to show the existence of the conspiracy and the commission of acts within the United States to assist in the perpetration of violent acts that caused death, injury, and property damage in Israel. See 18 U.S.C. § 956(a)(1). Likewise, this allegation is relevant to Counts Three

(conspiracy to provide material support to a designated FTO) and Four (conspiracy to make and receive contributions to SDTs and SDTGs) because it shows the existence of a conspiratorial agreement to provide material support and contributions of currency to PIJ (a designated FTO and a SDTG), and the actual provision to and receipt of such support and contributions by PIJ. See 18 U.S.C. § 2339B; 18 U.S.C. § 371; (Doc. 1 Ct. 3 ¶ 3(t), Ct. 4 ¶ 7.) Thus, Overt Act 253 cannot be stricken as surplusage. See, e.g., Rezaq, 134 F.3d at 1134 (affirming district court's refusal to strike information relevant to elements of an offense).

In addition, Overt Act 253, even as construed with the exculpatory information, still establishes the legal elements for Count 43 against FARIZ. To state a violation of § 1952(a)(2) and (3), the indictment must allege (1) travel in interstate or foreign commerce or use of a facility of interstate or foreign commerce; (2) with the intent to (a) commit a crime of violence to further an unlawful activity, or (b) otherwise promote, manage, establish, carry on, unlawful activity, or facilitate the same; and (3) the performance or attempted performance of an act in furtherance of that unlawful activity. See United States v. Tyler, 413 F. Supp. 1403, 1406 (M.D. Fla. 1976); 18 U.S.C. § 1952(a)(2) and (3). Eleventh Circuit Pattern Jury Instructions, Offense Instruction No. 67 (2003). The international telephone conversation described in Overt Act 253 discusses the deliberate transfer of funds to PIJ, an organization that engages in unlawful activities of extortion under Florida and United States law, and FARIZ expresses his concerns and provides advice regarding methods of concealing the transfer of such illicit funds. See Doc. 1 Ct. 1 ¶ 43(253). FARIZ's conversation displays an intent to assist in the commission of PIJ's violent crimes in furtherance of its

extortionate aims and furthers PIJ's unlawful activity by facilitating the provision of monetary resources necessary to enable PIJ to carry out its violent attacks. Thus, Overt Act 253, regardless of the exculpatory information, alleges the essential elements of a violation of the "Travel Act" and cannot be stricken. See United States v. Collins, 920 F.2d 619, 631 (10th Cir. 1990) ("[L]anguage in the indictment . . . describing the essential elements of the crime alleged is not surplusage and cannot be stricken under Rule 7(d)."). FARIZ has not alleged that he was not a participant, has not questioned the substance of the conversation or the logical inference that he knew who he was speaking to and who was being discussed.

b. Overt Act 236 (Count 35)

Overt Act 236 describes an international telephone conversation between FARIZ and a PIJ member during which FARIZ discusses donations to HAMAS, another terrorist organization that had been designated a FTO and a SDTG⁴, as well as funds that FARIZ had sent to the PIJ member. (See Doc. 1 ¶ 43(236).) Regardless of the name or specific identity of the PIJ member with whom FARIZ spoke, Overt Act 236 is relevant to Counts One through Four because, among other things, it is probative of the methods by which PIJ operated, the nature of the PIJ enterprise, the existence of a conspiracy, and FARIZ's knowledge of PIJ's activities such as its links with other terrorist organizations, and because it describes a specific instance of an illegal transfer of money to PIJ. Likewise, as an international telephone conversation discussing money transfers to PIJ that would further PIJ's unlawful extortionate activities, Overt Act

⁴See Redesignation of FTO, 66 Fed Reg. 51088, 51089 (2001); Exec. Order No. 12,947, 60 Fed. Reg. 5079 (1995).

236 establishes the elements of the Travel Act violation stated in Count 35. FARIZ has not alleged that he was not a participant and has not questioned the substance of the conversation as alleged in the Indictment.

c. Overt Act 240 (Count 37) and Overt Act 247 (Count 41)

Similar analysis and reasoning applies to Overt Acts 240 and 247. Overt Act 240 as stated in the Indictment describes an interstate or international conversation between FARIZ and co-defendant BALLUT about a variety of matters, including the local community's reaction to the June 5, 2002 terrorist bombing (Overt Act 237), the fact that the bombing was well organized, who made the bomb, how the bomb was made, the terrorist group the bomb maker used to belong to before joining the PIJ, the repercussions which SAMI AMIN AL-ARIAN might encounter because of the bombing and the transfer of "seven" and "five" (code words indicating amounts of funds) through AWDA and AWDA's confirmation of receipt. (See Doc. 1 ¶ 43(240).) Overt Act 247 relates an interstate or international conversation during which FARIZ told BALLUT that he had spoken with AWDA and that AWDA thanked BALLUT for the money but noted that the amount of money was less than the previous year and FARIZ said that the Secretary General of the PIJ, co-defendant RAMADAN ABDULLAH SHALLAH was in a hospital; however, they were keeping that news quiet because of security concerns. FARIZ and BALLUT then discussed three PIJ members who were recently killed. (See id. ¶ 43(247).) The potentially exculpatory information merely indicates that the person through whom the funds were transferred and who confirmed receipt in Overt Acts 240 and 247 was not AWDA but another PIJ member. This fact in no way diminishes the relevance of the PIJ money transfer or the other portion of these conversations to

Counts One through Four for the same reasons that the substitution does not affect the relevancy of Overt Acts 236 or 253. Again, FARIZ has not alleged that he was not a participant, has not questioned the substance of these conversations or the logical inference that he knew whom he was speaking to and who was being discussed.

Both overt acts also establish the elements of a "Travel Act" violation in Counts 37 and 41 respectively. Each involves an interstate or international telephone call whose content evinces both an intent to aid in the commission of a crime of violence to further extortion and money laundering and the performance of money transfers in furtherance of the extortion and money laundering.

In essence, the substitution of another PIJ member and activist for AWDA in each of the overt acts at issue does not eliminate the relevance of those allegations to the charges stated in the Indictment because they still establish facts indicating, inter alia, that FARIZ was involved in, among other things, managing PIJ's affairs, including fund-raising for its violent terrorist activities in Israel and transferring PIJ funds among its members, was intimately connected with other PIJ members and coconspirators, had knowledge of the methods, goals, and means of the charged conspiracies, and performed acts to further PIJ's unlawful activities. Thus, the overt acts construed in accordance with the government's Supplement to the Record and subsequent discussion with the Magistrate Judge not only support Counts One through Four, but also establish all of the elements of a "Travel Act" violation. Because each of the overt acts that FARIZ challenges describe essential elements of the crimes alleged, or at the very least are relevant to the elements, and constitute matters that the United States intends to prove at trial, FARIZ's motion to strike fails. See Collins, 920 F.2d at 631;

Scarpa, 913 F.2d at 1013; Climatemp, Inc., 482 F. Supp. at 391.

3. Even if the challenged overt acts were irrelevant to the charges, FARIZ's motion fails because he cannot establish prejudice.

FARIZ's inability to demonstrate that the disputed overt acts are irrelevant to the charges is fatal to his motion to strike because "[t]he determinative question in a motion to strike surplusage is not the potential prejudice, but rather the relevance of the allegation to the crime charged in the indictment." United States v. Giovanelli, 747 F. Supp. 875, 888 (S.D.N.Y. 1989). Even if he could establish irrelevance, however, FARIZ's alarmist claims about "great[] prejudice" and the risk of jury misperceptions based on the current Indictment are overblown.

At the threshold, there is no requirement that the indictment in any specific form be submitted to the jury or placed into evidence at any specific time.⁵ See United States v. Cisneros, 26 F. Supp. 2d 24, 55 (D.D.C. 1998) (rejecting defendant's argument on motion to strike that alleged surplusage would cause significant prejudice at trial). It has been the experience of the undersigned that in cases with a lengthy indictment, the court will read a summary of the indictment to the jury at the outset of trial. The jury is customarily not furnished a copy of the indictment until after all evidence has been received and arguments delivered and the court has delivered its legal instructions. For this reason, FARIZ's claims of prejudice are premature. See United States v. McVeigh, 940 F. Supp. 1571, 1584 (D. Colo. 1996) (denying motion to

⁵Although not necessary in this instance since the relevance of the overt acts is clear, it is telling that the Eleventh Circuit encourages district courts to reserve ruling on a motion to strike surplusage until after trial when the United States has had the opportunity to present evidence establishing relevance. See Awan, 966 F.2d at 1426.

strike surplusage as premature because the court would not provide copies of the indictment to the jury until after the final jury instructions were given), aff'd sub nom, United States v. Nichols, 169 F. 3d 1255 (10th Cir. 1999).

In any event, the Court will instruct the jury that the Indictment is not evidence and that it is the exclusive province of the jury to determine the facts based on the evidence admitted during the trial. See, Eleventh Circuit Pattern Jury Instructions, Basic Instructions 2.1 and 2.2. See, United States v. Giampa, 904 F. Supp. 235, 272 (D.N.J. 1995) (denying motion to strike and noting that such instructions protected against improper reliance by the jury on the indictment); Jackson, 850 F. Supp. at 1507 (denying motion to strike allegedly misleading and false allegation since the jury would determine the facts and the court would instruct the jury on the indictment's limited role); see also United States v. Huppert, 917 F.2d 507, 511 (11th Cir. 1990)⁶ (affirming denial of motion to strike based on trial court's cautionary jury instructions regarding the indictment). Such instructions should prevent any juror confusion about or misapprehension of the alleged overt acts by reinforcing that the indictment represents only what the grand jury found and that it is the task of the jury to determine the facts for themselves.⁷ Thus, FARIZ's concerns about prejudice are unfounded.

⁶Huppert was superseded by statute on other grounds. See United States v. McQueen, 86 F.3d 180, 184 (11th Cir. 1996).

⁷Courts presume that a jury will follow instructions. See Johnson v. Breeden, 280 F.3d 1308, 1319 (11th Cir. 2002) (citing Weeks v. Angelone, 528 U.S. 225 (2000)).

B. The Court should not dismiss Counts 35, 37, 41, and 43 under Fed. R. Crim. P. 7(c)(1) because the Indictment alleges the essential elements of each offense.

Lastly, there is no basis for dismissing Counts 35, 37, 41, and 43 of the Indictment under Rule 7(c)(1). As explained above, each overt act alleges the essential elements of its corresponding “Travel Act” Count, regardless of the consideration of the misidentification of AWDA. Furthermore, each Count is also supported by background information about the nature of the Defendants’ unlawful conspiracy to engage in extortion and money laundering contained in Part A of the Indictment and expressly incorporated by reference. Thus, the Indictment clearly contains the “plain, concise, and definite written statement of the essential facts constituting the offense charged” that Rule 7(c)(1) requires.⁸ See United States v. Woodruff, 296 F.3d 1041, 1046 (11th Cir. 2002) (“[I]t is axiomatic that an indictment is sufficient if it . . . presents the essential elements of the charged offense.”); United States v. Gold, 743 F.2d 800, 812-13 (11th Cir. 1984) (refusing to dismiss charge where indictment contained a paragraph supporting the essential elements of the offense and background information about the nature of the criminal scheme). Accordingly, Counts 35, 37, 41, and 43 should not be dismissed.

⁸FARIZ does not (and cannot) rely upon the other prongs of the Rule 7(c)(1) standard by arguing that the Indictment fails to apprise him of the charges or to protect against double jeopardy. See United States v. Baldarrama, 566 F.2d 560, 569 (5th Cir. 1978) (“An indictment need only contain the elements of the offense charged, apprise the defendant of what he must be prepared to meet and protect him from double jeopardy.”).

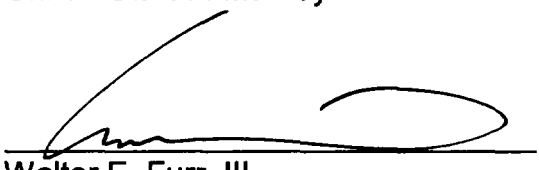
IV. CONCLUSION

For the foregoing reasons, the Court should deny FARIZ's Motion to Strike as Surplusage Paragraphs 43(236), (240), (247), and (253) of the Indictment, and to Dismiss Counts 35, 37, 41, and 43 of the Indictment.

Respectfully submitted,

PAUL I. PEREZ
United States Attorney

By: _____


Walter E. Furr, III
Assistant United States Attorney
Florida Bar No. 288470
400 North Tampa Street, Suite 3200
Tampa, Florida 33602
Telephone: (813) 274-6000
Facsimile: (813) 274-6108

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent
by facsimile and U.S. mail this ____ day of 27th, 2003, to the following:

Mr. Sami Amin Al-Arian
Register No. 40939018
Federal Correctional Institute
846 NE 54th Terrace
Coleman, Florida 33521-1029
Pro Se

Stephen N. Bernstein, Esquire
Post Office Box 1642
Gainesville, Florida 32602
Counsel for Sameeh Hammoudeh

Bruce G. Howie, Esquire
5720 Central Avenue
St. Petersburg, Florida 33707
Counsel for Ghassan Zayed Ballut

Kevin T. Beck
Federal Public Defender's Office
400 North Tampa Street
Suite 2700
Tampa, Florida 33602
Counsel for Hatim Naji Fariz



WALTER E. FURR, III
Assistant United States Attorney

ATTACHMENT "A"

1 UNITED STATES DISTRICT COURT
2 MIDDLE DISTRICT OF FLORIDA
3 TAMPA DIVISION

4 UNITED STATES OF AMERICA,) Case No. 03-CR-77-T-30-TBM
5)
6 Plaintiff,)
7) April 8, 2003
8 vs.) 2:00 p.m.
9) Tampa, Florida
10 HATIM NAJI FARIZ, ET AL,)
11)
12 Defendant.)
13)

14
15 TRANSCRIPT OF STATUS PROCEEDINGS
16 BEFORE THE HONORABLE MARK A. PIZZO
17 UNITED STATES MAGISTRATE JUDGE
18

19 APPEARANCES:

20 Counsel for Plaintiff: MR. WALTER FURR
21 MR. TERRY ZITEK
22 U.S. Attorney's Office
23 400 N. Tampa Street, Ste. 3200
24 Tampa, Florida 33602
25
26 Counsel for Defendant: MR. DONALD E. HORROX
27 Federal Public Defender's Office
28 400 N. Tampa Street, Ste. 2700
29 Tampa, Florida 33602
30
31 Court Reporter: MS. KATHLEEN P. WALDEN, RMR, CRR
32 Official Court Reporter
33 801 N. Florida Avenue
34 Tampa, Florida 33602

35 *****Proceedings recorded mechanically, stenographically,
36 computer-assisted transcription.

1 (Call to Order of Court)
 2 THE COURT: Good afternoon.
 3 MR. HORROX: Afternoon, Your Honor.
 4 THE COURT: We have what I'll call a status
 5 hearing in the case of United States versus Hatim Naji
 6 Fariz. This is case number 03-CR-77-T-30-TBM. Will counsel
 7 please announce their appearances.
 8 MR. FURR: Walter Furr and Terry Zitek for the
 9 government.
 10 MR. HORROX: Good afternoon, Your Honor. Don
 11 Horrox on behalf of Mr. Fariz.
 12 THE COURT: And let me add that this concerns the
 13 filing by the government yesterday afternoon entitled
 14 Government's Supplement to the Record, which refers to one
 15 specific piece of information. Well, more than one, but
 16 I'll read it as it stands.
 17 On April 7, 2003 at 12:30 p.m., the government was
 18 informed that the individual Hatim Naji Fariz spoke with,
 19 and the conversation described at overt act 253 in Count 1
 20 is a PIJ, P-I-J activist, other than Abd Al Aziz Awda, who
 21 is a defendant in this case. Accordingly, references to Abd
 22 Al Aziz Awda in overt acts 236, 240 and 247 in Count 1 are
 23 suspect.
 24 All defendants, of course, are in custody at
 25 Coleman, and that is at least more than an hour's drive. I

1 and 236. Excuse me, overt acts 253 and 236 when I was
 2 discussing Mr. Fariz. I discussed the content of those
 3 conversations that are contained in those two overt acts and
 4 attributed the other speaker in those two overt acts as,
 5 besides Mr. Fariz, as being Abd Al Aziz Awda, which you
 6 noted is a co-defendant in the case. I think I also said
 7 that he was a designated terrorist at the time. I think
 8 that's how I described him, if my memory's right.
 9 THE COURT: Mr. Awda.
 10 MR. FURR: That's correct. Judge, yesterday as
 11 the motion states, or as the notice to the Court, the
 12 supplementary notice states, we received information that as
 13 to paragraph 253, the individual that Mr. Hatim Naji Fariz
 14 was speaking with is a PIJ activist other than Mr. Awda. We
 15 have received no information to indicate that the subject
 16 matter or the discussions that are contained in 253 aren't
 17 all inaccurate. It was simply the person that was
 18 discussed, that he had the conversation with. So, to the
 19 extent in my proffer that I said the conversation in 253,
 20 and I think by implication 236, was Abd Al Aziz Awda, we are
 21 going to pull away from that and just say that it was a
 22 person other than Abd Al Aziz Awda who's associated with a
 23 PIJ. I can say that as to 2353. I impliedly say it as to
 24 236, and I think that raises some question as to the other
 25 two paragraphs that we indicate that they are discussing

1 considered possibly reopening the detention hearing, but
 2 would be unable to do that and have the defendants here
 3 until at least Monday, according to the marshals. So, I
 4 convened this status hearing simply to get some explanation
 5 for the government as to what they mean, and so that
 6 Mr. Horrox knows, since this concerns Mr. Horrox's client,
 7 and then I'll make some decision whether it's necessary or
 8 not to reopen the detention hearing.
 9 And so that the record is also clear, my staff has
 10 contacted counsel for all the other -- the defendants as a
 11 courtesy to them that they were invited to attend and would
 12 make available their presence by phone. All have matters
 13 scheduled, or at least I know that Mr. Ballut's counsel and
 14 Mr. Hammoudeh's counsel has other hearings that they are
 15 attending. I do not know with respect to Mr. Matassini who
 16 continues to represent Mr. Al-Arian for bail purposes.
 17 Well, who wishes to speak on behalf of the
 18 government to explain in somewhat more detail their
 19 pronouncement?
 20 MR. FURR: Judge, at the detention hearing the
 21 government proceeded by way of proffer, and while I don't
 22 have a transcript of what I said in front of me, I have some
 23 memory of it, and I have the benefit of Mr. Zitek's notes as
 24 to what I was saying, and they are consistent with what I
 25 believe I said, and that was that I mentioned paragraphs 253

1 conversations and then discuss an individual that we
 2 describe Abd Al Aziz Awda. They are still talking PIJ
 3 business.
 4 THE COURT: I understand that. This brings up a
 5 couple of questions that I have, and one is -- maybe more
 6 than a couple of questions. What one is, Mr. Awda is a
 7 speaker in other overt acts in the Indictment. Is the
 8 government contending that in those other overt acts there
 9 is an authentication issue? I'm not talking about other
 10 overt acts in which he is, for example, in the early overt
 11 acts where he is a speaker --
 12 MR. FURR: Where there's a videotape.
 13 THE COURT: -- and a videotape. I'm talking about
 14 only the intercepts.
 15 MR. FURR: No sir. The four that are listed are
 16 the only ones that we believe are at issue. And 253 is the
 17 only overt act that we can say we have great doubt that that
 18 was Abd Al Aziz Awda.
 19 THE COURT: The second question that brings to
 20 mind is that overt acts 240 and 247.
 21 MR. FURR: All right.
 22 THE COURT: With me?
 23 MR. FURR: Uh-hum. Yes sir.
 24 THE COURT: More so 247 than 240, but certainly
 25 240 also. Mr. Fariz is discussing with Mr. Ballut

1 conversations that he has had with Mr. Awda.
 2 MR. FURR: Among other things.
 3 THE COURT: Among other things.
 4 MR. FURR: Yes sir.
 5 THE COURT: How did the government determine that
 6 Mr. Awda was the subject of Mr. Fariz' conversation?
 7 MR. FURR: In 240 and 247?
 8 THE COURT: Sure. And the reason I ask that
 9 question, the way it's suggested in the overt acts is that
 10 Mr. Fariz used either Mr. Awda's name or some terminology
 11 that everyone knew -- put it this way, all those privy to
 12 the conversation that the speakers knew about, not the
 13 surveilling agents.
 14 MR. FURR: Judge, he uses a nickname. He used his
 15 nickname for both of those.
 16 THE COURT: And that nickname was what?
 17 MR. FURR: It's Abu Ahmed or Fadl Abu Ahmed, which
 18 is what the a/k/a is for Mr. Awda.
 19 THE COURT: What has led to you to question the
 20 identification of Mr. Awda in overt act number 253?
 21 MR. FURR: Excuse me just a minute.
 22 THE COURT: Because I have to tell you I view, at
 23 least in my calculus for determining the weight of the
 24 evidence against Mr. Fariz, and I've given this, as you can
 25 tell from the time that has elapsed from the date of the

1 THE COURT: Well, my understanding from all the
 2 proceedings that have occurred before me and before Judge
 3 McCoun, because I've been speaking to Judge McCoun about the
 4 discovery status, is that all the information obtained from
 5 intercepts up to the date of the Indictment have been
 6 declassified. Am I jumping to conclusions?
 7 MR. FURR: Well, we all did. We all did. But
 8 that's not the problem here. We are trying to get
 9 everything that is on those -- the 8,000 plus hours,
 10 whatever it is, declassified. The matters that were -- the
 11 conversations that were intercepted that are within the
 12 Indictment are all declassified. The -- but the
 13 information, like I said, that we gained yesterday is not
 14 from that.
 15 THE COURT: So, if I were to ask you to produce a
 16 transcript of the overt acts -- excuse me. If I were to ask
 17 you to produce a transcript of the intercepts and overt acts
 18 253, 236, 240 and 247, you would not be able to do that?
 19 MR. FURR: No. I might have those. The
 20 conversations have been declassified. They have surely been
 21 at least summarized. If I could check with my case agent, I
 22 could tell you whether I actually have those. Judge, I have
 23 reason to think that we can -- those can be taken care of
 24 hopefully fairly quickly if the Court wants to see them.
 25 There is a process that the FBI goes through regarding these

1 bail hearing, the detention hearing to now, while I have not
 2 been able to devote a hundred percent of my time given all
 3 my other duties, given it a considerable amount of thought.
 4 And I have viewed overt acts 236 and 253 as fairly damaging
 5 overt acts as to Mr. Fariz, for as much as what they say as
 6 also as much as what they imply.
 7 MR. FURR: Judge, the -- in 253 you have a
 8 conversation that involves Mr. Fariz, and as it's alleged,
 9 Abd Al Aziz Awda. It's a conversation that involves Abd Al
 10 Aziz Awda discussing PIJ business. All we're saying is it's
 11 somebody else besides Abd Al Aziz Awda discussing PIJ
 12 business.
 13 THE COURT: Well, who is it, then?
 14 MR. FURR: Judge, I can't tell you. The
 15 information at this point is classified. We were just given
 16 it yesterday at the time I told you. We're trying to get it
 17 unclassified so we can use it, but that has not been done
 18 yet.
 19 THE COURT: How long will that take?
 20 MR. FURR: I don't know. The problem with the
 21 classified information is it's information I generally
 22 cannot get my hands on somebody that can immediately do
 23 something with it. It's a much more labored process than
 24 that, as you might imagine. And like I said, this just came
 25 in yesterday.

1 transcripts off of FISA calls in which they have to
 2 physically go through the transcript and redact information,
 3 I would suggest probably investigation numbers and that sort
 4 of thing.
 5 THE COURT: Okay.
 6 MR. FURR: That has not been done --
 7 THE COURT: If you're going to be redacting
 8 subject matter of the conversation, it's --
 9 MR. FURR: No. No. Headers or footers, if you
 10 will, just to guide paper flow within the FBI. That's
 11 what --
 12 THE COURT: I understand that.
 13 MR. FURR: Is that fair? That's what I'm led to
 14 understand. That has not been done as to those. If the
 15 Court wants them, we can do that. I don't think there's
 16 anything within, substantively within any conversation in
 17 the Indictment that is of a classified nature.
 18 THE COURT: The only thing that's classified that
 19 you're telling me about now is the information that you
 20 obtained on --
 21 MR. FURR: Yesterday.
 22 THE COURT: -- April 7th at 12:30.
 23 MR. FURR: Yes sir. It's not the same.
 24 THE COURT: Mr. Furr, that brings up a lot of
 25 questions as to why it would be classified, frankly.

1 MR. FURR: Well, if I could tell you, it would
 2 alleviate the question, and that's the problem. I can't --
 3 you want to know and I can't tell you. And you might gather
 4 it's not my desire to not tell you. I would like to be able
 5 to and just end this, but --
 6 THE COURT: Well, I frankly am at a loss as to how
 7 to treat 253, 236, 240 and 247, frankly. If you are
 8 withdrawing that -- the proffer that Mr. Awda was a speaker
 9 in 253, I don't know what you mean by saying that 236, 240
 10 and 247 are suspect. And it seems to me that what you're
 11 really asking me to do is to withdraw all those.
 12 MR. FURR: No sir. What --
 13 THE COURT: Withdraw all those in the sense that
 14 any reference to Mr. Awda is not accurate.
 15 MR. FURR: Based on the information we received,
 16 it appears that 253 is with a PIJ activist other than
 17 Mr. Awda.
 18 THE COURT: And you're unwilling to tell me who
 19 this PIJ activist --
 20 MR. FURR: I can't tell you. Unwilling is not the
 21 proper word.
 22 THE COURT: I cannot evaluate whether this
 23 individual is an unindicted co-conspirator or someone who
 24 promotes the PIJ in a political sense to the extent that
 25 that can be squared away with the First Amendment as opposed

1 MR. FURR: As the speaker on that call. That's
 2 correct. That's correct.
 3 THE COURT: Which makes me wonder as to the other
 4 authentications of Mr. Awda in other conversations, which
 5 there are few.
 6 MR. FURR: Well --
 7 THE COURT: Whether there are authentication
 8 issues as to those.
 9 MR. FURR: I am not aware of any that are even
 10 arguable at this point beyond simply saying because there's
 11 one problem there could be others. I mean, we -- I think we
 12 have --
 13 THE COURT: Which brings me to the question as to
 14 how you ascertained -- what's the difference? That's the
 15 question. What's the difference between your authentication
 16 process in 253 as opposed to anywhere else in the Indictment
 17 where Mr. Awda is a speaker? Because as has been
 18 represented to me, you have said that your Arabic speakers
 19 became familiar with many of the voices --
 20 MR. FURR: That's correct.
 21 THE COURT: -- at ICP conferences, those videos,
 22 and that as a consequence have carried that through --
 23 MR. FURR: That's correct.
 24 THE COURT: -- throughout all of the intercepts.
 25 Now, towards the end of conspiratorial period, this is

1 to actively supporting and maybe committing some potential
 2 violation of the law.
 3 MR. FURR: Well, and I don't want to get into --
 4 obviously, I don't want to use this. I'm just trying to
 5 answer the Court's questions, and I don't want to sit up
 6 here and argue anything about this. Recall that the -- you
 7 cannot give money to the PIJ.
 8 THE COURT: I understand that.
 9 MR. FURR: And that's what 253 is essentially
 10 about. It's a money call, if you will. Because of that, we
 11 felt that, 236, 240 and 247, as far as those conversations
 12 being either with or referencing a person Abd Al Aziz Awda
 13 was at issue because of it. And that's why --
 14 THE COURT: So, his reference; that is, Mr. Fariz'
 15 reference to Abu Ahmed, or any of the other aliases could be
 16 somebody else?
 17 MR. FURR: Well, we think it's the same person
 18 he's talking to on 253, or talking about on 253.
 19 THE COURT: Yeah, but in 253 Awda is a speaker.
 20 MR. FURR: Yes sir.
 21 THE COURT: I mean, what you're telling me is you
 22 have obtained information which obviously goes to the
 23 authentication Mr. Awda as a -- as somebody who is
 24 conversing on the telephone with Mr. Fariz on November 10th,
 25 2002.

1 November 10th, 2002, the last overt act is December 9, 2002.
 2 Really, there's only two other intercepts after this
 3 November 10, 2002 overt act. You're telling me that
 4 Mr. Awda is not the speaker.
 5 MR. FURR: That appears to be the case.
 6 THE COURT: So, why shouldn't I question all the
 7 other authentications that occurred before then as a matter
 8 of logic? The car is blue. I have a car. The way it goes
 9 is, if all cars are blue and I have a car, my car is blue.
 10 MR. FURR: Judge, many of the Hatim Naji Fariz
 11 FISAs' operated, if you will, out of another office. They
 12 are not operated out of Tampa.
 13 THE COURT: You mean as far as the surveillance is
 14 concerned?
 15 MR. FURR: As far as -- way the FISAs work is they
 16 are obtained, as you're aware, through the FISA court and
 17 with OIPR and the Department of Justice. The U. S. Attorney
 18 Offices are not involved with them, and they work with a
 19 particular portion of the FBI. I mean, J. Carter squad is
 20 the one that works them here. All right. Hatim Naji FISAs
 21 were by and large worked in Chicago. They were not worked
 22 here.
 23 THE COURT: I have a suggestion to you, Mr. Furr.
 24 MR. FURR: Sure.
 25 THE COURT: Based on my past experience about

1 intercepts, which is not a very good one. If you have any
2 question about anything verify, verify, verify. And I know
3 you well enough and Mr. Zitek well enough that I have great
4 respect for your abilities, as I do for Mr. Horrox's
5 abilities. All the lawyers in case are excellent lawyers.
6 But these are the kind of thorny issues where particularly
7 lawyers are having to rely on agents they may not know as
8 well as the case agents. It becomes difficult.

9 MR. FURR: Sure.

10 THE COURT: I mean, if we're having difficulty --
11 our intelligence community is having difficulty in
12 determining whether Saddam Hussein is on a videotape or
13 whether it's a double or whether the voice is his voice,
14 authentication issues can be extremely thorny. And I
15 understand from looking at this indictment as many times as
16 I have looked at it, the Awda conversations are fairly
17 limited. But as to Mr. Fariz, rightly or wrongly I've
18 attached some significance to those conversations. And I
19 don't know how to -- you are, in effect, asking me to simply
20 substitute a PIJ activist for Mr. Awda and give it the same
21 weight and consideration.

22 MR. FURR: Judge, I'm not asking you to give it
23 any particular weight and consideration. I am asking you to
24 substitute where we said Awda on 253 for a PIJ activist, who
25 is not Mr. Awda. The conversations occurred -- that's --

1 than some PIJ associate or wannabe.

2 MR. FURR: I understand.

3 THE COURT: And if he's not talking to Mr. Awda
4 and he's talking to a PIJ wannabe, then it's a lot
5 different, in my estimation, in assessing dangerousness to
6 the community.

7 MR. FURR: Judge, all I can say is it doesn't
8 appear to be Mr. Awda.

9 THE COURT: Well, let me ask Mr. Horrox, if I
10 wanted to have this hearing, Mr. Horrox, as quickly as
11 possible, even though I understood that your client would
12 not be here, so that's why I have called it a status
13 hearing, do you have any position on anything that you've
14 heard? And if so, I'll be glad to hear you.

15 MR. HORROX: Thank you, Your Honor. Yes, I
16 obviously do.

17 THE COURT: I know that you are looking through a
18 keyhole into a dark room, and I'm almost right next to you.

19 MR. HORROX: I think we're in the same posture,
20 Your Honor. But you're correct. Obviously I do have an
21 opinion, Judge. First of all, I don't believe I'm in a
22 position to waive Mr. Fariz' appearance for any proceedings
23 that we have in connection with this issue beyond today. I
24 would note for the record that another bone of contention
25 that has been bantered about this week has been the location

1 THE COURT: I understand.

2 MR. FURR: -- that's not the issue. By the way,
3 these are foreign language conversations. I mean, there is
4 a reliance here, but the conversations occurred. That's not
5 the issue -- that was not our issue we wanted to bring this
6 to the Court. We just learned that 253 is someone other
7 than Awda, and because the detention issue was out there, we
8 thought this was something we needed to get to you right
9 away, and that's the reason we --

10 THE COURT: I understand. And I appreciate the
11 government's candor. And I want you to be sensitive to the
12 issue that I have. And the detention issue as to Mr. Fariz
13 is a difficult one. It's not cut and dry as to Mr. Fariz.

14 MR. FURR: Judge, I would concur, with what was
15 just whispered to me by Mr. Zitek. Judge, I concede, we
16 concede as to 253 to the extent it is not Abd Al Aziz Awda,
17 the conversation may or may not be worth as much or as
18 important or as powerful as it might otherwise be.

19 THE COURT: Let me explain to you why I think, and
20 Mr. Horrox can comment, why I think the conversations
21 between Mr. Fariz and Mr. Awda, as well as Mr. Shallah are
22 important. To me, those conversations signify the value
23 that Shura council members other than as alleged. Mr.
24 Al-Arian gave to Mr. Fariz, and that Mr. Fariz had access to
25 these individuals, and this signifies to me more importance

1 of all the defendants at Coleman. I would ask the record
2 note that if they had been closer, then, it might have been
3 possible to bring them here today. I know that's not the
4 Court's doing, but I see that as being another issue very
5 soon to arrive on the horizon.

6 THE COURT: I'm not sure that's the case, but I
7 understand your position.

8 MR. HORROX: Judge, in short my position would be,
9 in view of what we've heard here today, that the Court
10 should not take into consideration any of the allegations in
11 those paragraphs. My position would be that the Court
12 should simply discard the information in making its
13 determination as to the weight of the evidence in this case.
14 The government has to sleep in the bed that it made. And
15 they came in here. They relied solely upon the Indictment
16 in this case, which I argued in my argument to the Court
17 established more than probable cause found by a Grand Jury.
18 And now it turns out that some of the allegations in that
19 indictment were wrong. And when pressured by the Court or
20 pressed by the Court to offer an explanation, the government
21 can't do it because the items are classified. That does not
22 assist the Court in any way toward a determination as
23 whether the weight of the evidence against Mr. Fariz is
24 persuasive, if I may use a word that the Court used at the
25 hearing when I pointed out it was the finding of probable

1 cause. I think the Court had told me, well, Mr. Horrox, I
2 find the allegations to be persuasive.
3 And obviously, with all due respect to the Court,
4 to the extent that the Court may have found these
5 allegations to be persuasive, we're finding out today they
6 are not in the least bit persuasive. I think there are huge
7 issues in this case beyond the detention issues that have
8 been raised by the government's supplement to the record. I
9 think there's Brady issues here. I think there may be
10 issues as to the credibility of the testimony presented to
11 the Grand Jury which may allow the defense to file motions
12 to get transcripts of these proceedings. That's for another
13 day.

14 As to the detention issue, though, Your Honor, I
15 would submit that unless the government can tell the Court
16 who this other person was, who is in the government's
17 opinion not Mr. Awda, and how they can tell if this person
18 was another PIJ activist, as opposed to someone not
19 associated with the PIJ, then I think the Court is well
20 within its right to disregard the allegations in this
21 paragraph, or in these paragraphs because the government
22 doesn't allow the Court anything which would allow the Court
23 to find that these allegations are compelling or persuasive,
24 or whatever adjective we want to assign to them.

25 I think it severely compromises the strength and

1 these many wire counts, and it alleges as defendants
2 Mr. Awda and Mr. Fariz. And it says it's a telephone
3 conversation for the type of facility. And then it
4 incorporates by reference the allegation contained in overt
5 act 236, which is one of the paragraphs or overt acts which
6 the government in its supplement to the record has
7 characterized for the Court as being suspect. And
8 furthermore, which the government in the second paragraph of
9 that supplement indicates that they are withdrawing the
10 argument from that that was Mr. Fariz in contact with
11 Mr. Awda.

12 That being the case, Your Honor, it would seem to
13 me that it's going to be incumbent upon the government at
14 some point in time to dismiss that count against Mr. Fariz
15 and Awda. I don't know how the government can proceed with
16 respect to that count. So, that's one count that it seems
17 that the government is going to have to abandon against
18 Mr. Fariz.

19 Similarly, Count 43 is another wire count, which
20 alleges Mr. Awda and Mr. Fariz as being two of the
21 defendants, the only two defendants alleged. It's alleged
22 to be a telephone conversation, and it incorporates by
23 reference paragraph 253, which the government, as is stated
24 in its notice or supplement, that as Mr. Furr further
25 elaborated on today is probably the conversation of which

1 the weight of the evidence against Mr. Fariz. I think the
2 reason for that is that Mr. Awda, as the Court has alluded
3 to just a few moments earlier, Mr. Awda is alleged in
4 paragraph 12 at the outset of the Indictment to be a founder
5 and spiritual leader of the PIJ and a member of the
6 governing Shura council. Now, if Mr. Fariz was not speaking
7 to him and was speaking to someone who was wholly innocent,
8 or in the best case for the government it would seem at this
9 point, someone who maybe had some knowledge or association
10 with the PIJ, then that severely compromises the strength of
11 the evidence and the weight of evidence against Mr. Fariz.
12 And I think there's -- it goes beyond that, Judge.

13 We can look at Count 35 in the Indictment, which
14 is a wire count, which alleges to be between Mr. Fariz and
15 Mr. Awda on May 26th, of 2002, and it specifically makes
16 reference to over act 236.

17 THE COURT: Excuse me, Mr. Horrox, which number
18 did you say?

19 MR. HORROX: This would be Count 35. It's a wire
20 count. It charges Mr. Fariz and Mr. Awda.

21 THE COURT: Could I ask you to pause for a moment?

22 MR. HORROX: Yes, Your Honor.

23 THE COURT: I have a note on my desk that I
24 omitted to bring. You were speaking about Count 35.

25 MR. HORROX: Yes, Your Honor. Count 35 is one of

1 they are most convinced was not Mr. Awda as a participant.
2 That count, it would seem to me, the government at some
3 point is going to have to abandon as well.

4 So, there's two counts against Mr. Fariz, which I
5 don't believe are well-founded in the Indictment, yet a jury
6 found probable cause -- Grand Jury found probable cause to
7 indict both Mr. Awda and Mr. Fariz on those counts.

8 A third count, Count 41, alleges to be between Mr.
9 Ballut and Mr. Fariz, a telephone conversation which
10 incorporates by reference overt act 247. In that
11 conversation, Your Honor, Mr. Fariz and Mr. Ballut are
12 allegedly discussing Mr. Awda. And in the government's
13 supplement, which it filed with the Court, they characterize
14 that overt act as being suspect and are withdrawing the
15 argument that Mr. Fariz was in contact with Mr. Awda with
16 respect to, I suppose, that overt act as well. That's
17 another count that I don't think the government is going to
18 be able to proceed upon.

19 It also casts into doubt the integrity and
20 credibility of the allegations against Mr. Fariz with
21 respect to Count 3, which is the conspiracy to provide
22 material support. If you look at page 95 of the Indictment,
23 in wrapping up a description of the charge in the last
24 sentence, it says, Throughout 2002, Hatim Naji Fariz spoke
25 by telephone with Mr. Awda, who was overseas, about

1 transfers of funds to Mr. Awda to be used for PIJ. But what
2 we're finding out today is that the government doesn't
3 believe that Mr. Fariz was in touch with Mr. Awda, which
4 severely casts into doubt this count against Mr. Fariz.

5 And it seems to me, Judge, in reading the
6 government's indictment, a large part of what they allege,
7 that this case is about the alleged accumulation of funds
8 here in the states to send to the PIJ in the Middle East. A
9 large part of what the government has alleged against
10 Mr. Fariz in this Indictment is that Mr. Fariz, however the
11 money was accumulated here, he sent to none other than
12 Mr. Awda. And now we're hearing from the government, no, he
13 didn't have conversations with Mr. Awda. It was someone
14 else. It casts a real wedge, it seems to me, into the
15 allegations of not only those wire counts but also Count 3,
16 and even Count 4, which is a conspiracy to make and receive
17 contributions of funds, goods or services to or for the
18 benefit of specially designated terrorists, and that count
19 alleges that Mr. Awda was a specially designated terrorist.
20 And it incorporates by reference paragraphs 122 to 255 of
21 the Indictment, which includes these paragraphs. And now
22 the government is saying, no, Mr. Fariz wasn't speaking to
23 Mr. Awda. So, what does that mean with respect to Count 4?

24 Judge, I respectfully submit to the Court that the
25 allegations against Mr. Fariz are severely in question in

1 THE COURT: I'm not prepared to -- I mean, I will
2 evaluate the overt acts as to Mr. Fariz and the proffer as
3 to Mr. Fariz and make a determination whether leaving aside
4 these overt acts he presents a flight risk and a danger to
5 the community. But what I am telling you is, is that based
6 upon your proffer this morning, as corrected, and taking
7 account the proffer you made previously at the detention
8 hearing, the government's case against Mr. Fariz is not as
9 convincing as it was or persuasive as it was previously.
10 Because the tenor of the conversations is now much more
11 open.

12 MR. FURR: Judge, all I can -- my only response
13 that I can make regarding the fact that it's no longer
14 Mr. Awda on 253 as to the -- as to the -- as vigorous as we
15 tell you it's not Mr. Awda, we say with the same vigor it's
16 another PIJ activist. That's all I can say.

17 THE COURT: Well --

18 MR. FURR: That's really all I can -- and I
19 understand that Awda is a heavyweight. I understand that.
20 I understand that. And I understand the Court, if you want
21 to you can legitimately say that's more important, you know,
22 if I know he's talking to someone, if you will, has a rank
23 in the organization. I understand that. But that's all I
24 can say at this point.

25 THE COURT: Okay.

1 this case. And to the extent that the Court feels that the
2 weight of the evidence against Mr. Fariz is a factor in
3 deciding whether to detain him or not, I would respectfully
4 submit that it's become a non factor, because the integrity
5 and the credibility of the government's investigation
6 against Mr. Fariz is severely in question. And that being
7 the case, I urge the Court to set a bond for Mr. Fariz in
8 this case.

9 MR. FURR: Just the briefest of responses. The
10 telephone counts which are -- that he discussed, which are
11 Counts 35, 37, 41 and 43 are not dependent on whether the
12 person that was either being talked to, as in two of them
13 was Abd Al Aziz Awda, or whether they were talking about Abd
14 Al Aziz Awda. If you look a couple of those conversations
15 Abd Al Aziz Awda was an afterthought in them.

16 THE COURT: I think the difficulty, though, that
17 I'm having, Mr. Furr, is accepting the principle that the
18 government wants me to accept. That any discussion about
19 money is necessarily PIJ money as opposed to money that goes
20 to innocent causes or non prohibited causes. And without
21 knowing who this individual, this PIJ activist is, I don't
22 have a great deal of confidence in being able to say that
23 those conversations that the government now views as suspect
24 as to the speaker, Mr. Awda, deals solely with PIJ business.

25 MR. FURR: Judge, all I can respond to that --

1 Well, I'm going to take the record as it's been
2 presented to me and make some determination as to whether
3 Mr. Fariz is a flight risk or a threat to the community.
4 And I can tell you Mr. Horrox, that if I make a
5 determination that I think he certainly might be, I will
6 reopen the detention hearing for the purpose of having your
7 client be able to hear the proffer of the government as to
8 these items we discussed today and any information that the
9 government has to present, and as well hear any counter
10 arguments that you have.

11 MR. HORROX: Yes, Your Honor.

12 THE COURT: And I will do that as quickly as I
13 can, evaluate what the government has told me and what
14 you've told me.

15 MR. HORROX: Judge, if I can just have very brief
16 response to Mr. Furr's last comments. The government urges
17 the Court to find that even though they are convinced, I
18 guess at this point, that Mr. Fariz was not speaking to
19 Mr. Awda in that telephone conversation, that they were just
20 as sure that it was another PIJ activist. They offer
21 nothing to the Court in the way of evidence at all to assist
22 the Court in making that determination.

23 THE COURT: I Noticed that, Mr. Horrox. And I'm
24 sure Mr. Furr and Mr. Zitek realize that as well. And let
25 me look through my notes and see if I had any more

1 questions.

2 Not to put words in your mouth, Mr. Furr, but I
3 want to make sure before I leave the bench that I have as
4 full an understanding as I can as to what the government's
5 position is. And that is that in 253 the government is now
6 of the position that the speaker, one of the speakers was
7 not Mr. Awda, correct?

8 MR. FURR: That is correct.

9 THE COURT: That in 236 an intercept which
10 preceded the November 10, 2002 overt act 253 intercept by
11 approximately four months, this occurring on May 26, 2002,
12 that the government is unsure whether the speaker was
13 Mr. Awda?

14 MR. FURR: That's because of 253.

15 THE COURT: Am I to understand whoever confirmed
16 that 253 was not Mr. Awda, has not had a chance to review
17 236 yet?

18 MR. FURR: Judge, I think that the person or party
19 that said 253 does not appear to be Mr. Awda has caused us,
20 and think also has concerns about whether by implication 236
21 is Mr. Awda as well.

22 THE COURT: Okay.

23 And 240 and 247 are suspect because they reference
24 conversations about Mr. Awda?

25 MR. FURR: That's correct. That's correct. To

1 the extent they appear -- again, I'm not trying to argue.
2 If you look at 240, you'll see it was a long range of
3 conversation --

4 THE COURT: Right. I understand.

5 MR. FURR: -- at the very end deals somewhat with
6 Abd Al Aziz Awda.

7 THE COURT: The only suspect portion is any
8 conversations recapitulating what Mr. Fariz may have talked
9 to Mr. Awda about in 253?

10 MR. FURR: That's correct.

11 THE COURT: Okay. Anybody have anything to add
12 before we close?

13 MR. FURR: No sir.

14 MR. HORROX: No, Your Honor.

15 THE COURT: All right. Thank you.

16

17 (Thereupon, the proceedings were concluded.)

18

19 *****

20 CERTIFICATE

21 I hereby certify that the foregoing is an accurate
22 transcription of proceedings in the above-entitled matter.

23

24

25 _____
Official Court Reporter

Date